91-1469

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

BRUTOCO ENGINEERING & CONSTRUCTION, INC.,
Petitioner,

VS.

AMERICAN INTERNATIONAL GROUP, INC. and
AMERICAN HOME ASSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE AFTER DENIAL OF PETITION FOR HEARING BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

Brutoco Engineering & Construction, Inc. sought to recover from American International Group and others damages for a pattern of mail and wire fraud subject to criminal and civil sanctions under RICO, 18 U.S.C. § 1961, et. seq. The Court of Appeal of California held that the McCarran-Ferguson Act of 1945, 53 Stat. 33, precluded suit. As such, this litigation raises two important, unsettled, and recurring issues:

(1) In light of RICO's Liberal Construction Clause, does mail and wire fraud under RICO in the sale of insurance constitute "the business of insurance"?

(2) In light of RICO's No Supersession Clause, does RICO's civil sanctions "invalidate, impair or supersede" state law "regulating the business of insurance"?

In conflict with prevailing law, the Court of Appeal held in the affirmative.

This Petition seeks review of this decision.

LIST OF PARTIES

The following parties appeared below.

Party Plaintiff:

Brutoco Engineering & Construction, Inc.

Parties Defendant:

American International Group, Inc.

American Home Assurance Company

Corroon & Black

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TABLE OF AUTHORITIES CITED

CITED

CASES: PAGE NO .

Agency Holding Corp. v. Malley Duff & Associates, 483 U.S. 143 (1989) . 12

Becks v. Emery-Richardson, Inc., 1990 U.S. Dist Lexis 19326 (S.D. Fla. 1990) 17

Brownell v. State Farm Mutual Insurance Co., 757 F. Supp. 526 (E.D. Pa. 1991) 17

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In Re Long Distance Telecommunications Litigation, 831 F.2d 627 (6th Cir. 1987) 18

Leckey v. Aetna Casualty & Surety Co., 590 A.2d 1255 (Sup. Ct. Pa. 1991) . . 17

Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), cert. denied, 485 U.S. 993 (1988) 19

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Women in City Government, United v. City of New York, 515 F. Supp. 295 (S.D. N.Y. 1981) 18

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H. Rep. No. 102-312, 102nd Cong., 1st Sess. (1991) 13

Oversight Civil RICO: Hearings Sen. Jud. Comm. 99th Cong., 1st Sess. (1985) 10

Subcomm. on Oversight and Investigations of House Comm. on Energy and Commerce, 101st Cong. 2d Sess., Failed Promises: Insurance Company Insolvencies (Comm. Print 1990) . 24

MISCELLANEOUS:

Barry Meir, A Growing U. S. Affliction: Worthless Health Policies, N.Y. Times, Jan. 4, 1992 24

Blakey & Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and The Various Proposals for Reform: "Mother of God--Is This The End of RICO?", 43 Vanderbilt L. Rev. 851 (1990) 11, 12

Gordon Witkins Health Care Fraud, U.S. News & World Report, Feb. 24, 1992 23

Peter Kerr, Vast Amount of Fraud Discovered in Worker's Compensations System, N.Y. Times, Dec. 29, 1991 23

Robert Pear, Many on Medicare are Overcharged Despite New Law, N.Y. Times, March 1, 1992. 24

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BRUTOCO ENGINEERING & CONSTRUCTION, INC.,
Petitioner

v.

AMERICAN INTERNATIONAL GROUP, INC. and
AMERICAN HOME ASSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE AFTER DENIAL OF PETITION FOR HEARING BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINIONS BELOW

The Court of Appeal of California's opinion was certified for publication. It appears at 234 Cal.App.3d 749, 285 Cal. Rptr 765 (1991). It is reproduced at Appendix 1.

The Supreme Court of California denied a Petition for Review. The denial is reproduced at Appendix 2.

JURISDICTION

The Supreme Court of California denied review on December 12, 1991. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. Section 1254(1) (certiorari) and Rule 10.1(b) (conflict) and (c) (important and unsettled questions) of this Court.

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act (RICO), Title 18, United States Code, in relevant part, provides:

Section 1961. Definitions.

As used in this chapter --

(1) "racketeering activity" means...any act...under...Title 18 United States Code...Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud)...;

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(3) "person" includes any individual or entity...;

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(4) "enterprise" includes any individual...or other legal entity...;

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(5) "pattern of racketeering activity" requires at least two acts of racketeering activity...;

Section 1962. Prohibited Activities.

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(c) It shall be unlawful for any person employed by or associated with any

enterprise...to conduct or participate in the conduct of enterprise's affairs through a pattern of racketeering activity...

***

Section 1964. Civil Remedies.

(c) Any person injured in his business or property by reason of a violation of Section 1962 of this Chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the costs of suit, including a reasonable attorney's fee.

84 Statutes at Large 947 (1970) provides:

Section 904 (a) The provisions of...[RICO] shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in...[RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalties

or affording civil remedies in addition to those provided in...[RICO].

The McCarran-Ferguson Act, 59 Statutes at Large 33 (1945) (15 U.S.C. § 1011, et seq.), in relevant part, provides:

Section 1.

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2.

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance....

STATEMENT OF THE CASE

On March 14, 1990, Brutoco Engineering & Construction, Inc. ("Brutoco") filed a Complaint in the Superior Court of the State of California for the County of Los Angeles. Brutoco's Complaint alleged that in 1986 Brutoco entered into a standard California Workers' Compensation insurance contract with American International Group, Inc. and American Home Assurance Company ("AIG") that purported to afford Brutoco coverage under the California Workers' Compensation law. Brutoco agreed to pay

all premiums when due. AIG purported to agree to defend and indemnify Brutoco for claims for bodily injury arising out of and in the course and scope of a workers' employment with Brutoco.

The policy provided that after termination of the policy period, AIG would make an audit of the records of Brutoco in order to compute premiums and dividends pertaining to the policy. AIG also agreed to return to Brutoco the difference between the retrospective premium and the premiums paid by Brutoco, if the retrospective premium was less than the premium paid. In brief, AIG agreed to refund premiums paid by Brutoco depending on Brutoco's claim history after a stated period of time.

In fact, Brutoco was entitled to a refund of premiums that had previously been paid to AIG, but AIG breached its policy by not returning to Brutoco the

difference between the retrospective premium and the premium previously paid by Brutoco to AIG. Moreover, AIG's failure to pay the premium refund to Brutoco under the policy was based on its fraudulent intent, formulated before it entered into the purported contract, never to pay such a refund.

Brutoco sued AIG alleging a number of claims for relief. The Tenth Claim For Relief was under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1961, et seq. Brutoco alleged that AIG engaged in a pattern of mail and wire fraud affecting interstate commerce, which caused injury, not only to Brutoco, but also to other insureds throughout the United States.

The Superior Court of Los Angeles County denied a motion for a judgment on the pleadings on Brucoco's Tenth Claim for Relief. AIG sought a writ of Mandate in

the Court of Appeal of the State of California, Second Appellate District, Division Three. AIG asserted that the Tenth Claim for Relief was precluded by the McCarran-Ferguson Act of 1945, 59 Stat. 33 (15 U.S.C § 1011, et seq.) (McCarran Act") and the laws of the State of California that regulated the business of insurance. The Court of Appeal granted the Writ. Review was denied by the Supreme Court of California.

REASONS FOR GRANTING THE WRIT

This Court Should Grant A Writ Of Certiorari To Review The Court Of Appeal's Decision Since It Is In Conflict With A Controlling Decision Of The Seventh Circuit Court Of Appeals, The Text Of RICO, And The Teachings Of This Court, And It Unsettles An Important Issue Of Law, The Application Of RICO To Insurance Fraud.

Today, the application of RICO, an

important federal statute, under the provisions of the McCarran Act, to insurance fraud, an important national problem, is in doubt in light of the "novel" decision of the Court of Appeal. 234 Cal. App. 3rd at 750, 285 Cal. Reptr. at 766. The need to assure integrity in the insurance industry requires that it be reversed.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO". Today, it is the prosecutor's tool of choice in dealing with sophisticated forms of crime. Oversight Civil RICO: Hearings Sen. Jud. Comm., 99th Cong., 1st Sess. 106, 109-11 (1985) (testimony of Asst. A. G. Trott).[1]

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[1] See also Federal Government's Use of RICO Statute and Other Efforts Against Organized Crime, S. Rep. No. 101-407, 101st Cong., 2nd Sess. 31-36 (1990) ("The successful prosecution of... [organized crime] families...resulted from innovat[ive]...use...of RICO statute...").

Insurance fraud must not be afforded a RICO safe harbor under the McCarran Act.

RICO criminal prosecutions are running at the rate of approximately 110 per year, of which 48% are in the political corruption and white-collar crime area, 39% are in the organized crime and labor racketeering area, and 13% are in other areas.[2] In recent years, this Court turned aside efforts to construe RICO narrowly in four criminal appeals. United States v. Turkette, 452 U.S. 576 (1981); Russello v. United States, 465 U.S. 576 (1983); United States v. Monsanto, 491 U.S. 600 (1989); Caplin v. Drydale v. United States, 491 U.S. 617 (1989).

Private parties did not begin to

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[2] Blakey & Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and The Various Proposals For Reform: "Mother of God--In This The End of RICO?," 43 Vanderbilt L. Rev. 851, 1020 (1990) ("Myths").

bring Civil RICO suits until about 1975. Such filings are now running at the rate of approximately 1,000 per year. Myths at 1018-19.[3] This Court turned aside efforts to construe RICO narrowly in five civil appeals. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987); Agency Holding Corp. v. Malley, Duff & Associates, 483 U.S. 143 (1989); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); Tafflin v. Levitt, 110 S. Ct. 792 (1990). Here, too, this Court must restore RICO to its congressionally mandated broad scope. If RICO is to be restricted, "it is a job for Congress...." H. J. Inc., 492 U.S. at 249.

After extensive hearings, Congress,

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[3] Reported filings may understate the number of actual filings by a factor ranging from 2.6 to 10.6. Myths at 870-72.

moreover, is now moving to narrow the scope of Civil RICO by a "gatekeeper" concept that will confine it to major litigation appropriately in the federal courts. See H. Rep. No. 102-312, 102nd Cong., 1st Sess. (1991) (reporting H.R. 1717). Nevertheless, the pending legislation does not deal with the application RICO to insurance fraud, a pressing national problem. If Congress is unwilling to act, no court ought to be so bold.

The McCarran Act exempts from federal law only those activities that constitute "the business of insurance", but then only to the extent that a federal statute would "invalidate, impair, or supersede" state law. It exempts, in short, the "business of insurance," not the "business of insurers." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979).

This Court, moreover, follows a three part test for determining what constitutes the "business of insurance:" (1) it must have the effect of transferring or spreading a policyholder's risk, (2) it must be an integral part of the policy relationship between the insurer and the insured, and (3) it must be limited to entities within the insurance industry. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 48-49 (1987); Union Labor Life Ins. Co. v. Pirero, 458 U.S. 119, 129 (1982).

Contrary to the Court of Appeal, activity that meets the elements of the criminal mail or wire fraud statutes under RICO, however, simply cannot pass this test, as is demonstrated by the prevailing precedent. In the leading decision of United States v. Sylvanus, 192 F.2d 96 (7th Cir. 1951), cert. denied, 342 U.S. 943 (1953), defendants were convicted for

mail fraud in the sale of accident and sickness insurance policies. Defendants argued that their conduct was regulated exclusively by Illinois law, since the McCarran Act precluded enforcement of the federal mail fraud statutes in the insurance fraud context. The Seventh Circuit disagreed, holding:

> [B]y...[the McCarran...Act], the Congress established a public policy upon the part of the National Government to refrain from interference with the regulation and taxation of insurance companies by the several states.... It cannot properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants

> have used the mails in pursuance of a scheme so as to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. Id. at 100.

The Seventh Circuit added that the McCarran Act did not preempt enforcement of the mail fraud statute against persons engaged in the insurance field merely because state law also regulated that conduct. The Seventh Circuit held:

> We conclude...it was not the intent of the Congress, by its passage of the McCarran... Act to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether mails have been utilized in attempted execution of a scheme to defraud

> and that the District Court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state.... Id. at 100.

The Sylvanus decision is, therefore, in direct conflict with the decision of the Court of Appeal.[4] See also Dana v. Blue Cross, 900 F.2d 882, 888 (6th Cir. 1990) (insurance fraud under RICO not precluded by McCarran Act) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-49

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[4] See also Washburn v. Brown, 1986 West Law 7062 (N.D. Ill. 1986) (insurance fraud under RICO not precluded by McCarran Act) (relying on United States v. Sylvanus, 192 F.2d 96, 100 (7th Cir. 1951)); Brownell v. State Farm Mutual Insurance Co., 757 F. Supp. 526, 536-37 (E.D. Pa. 1991) (auditing services fraud under RICO not precluded by McCarran Act) (following Washburn v. Brown, supra); Becks v. Emery-Richardson, Inc., 1990 U.S. Dist. Lexis 19326 (S.D. Fla. 1990) (insurance fraud under RICO not precluded by McCarran Act). Contra Senich v. Transamerica Premier Ins. Co., 766 F. Supp. 339, 342 (W.D. Pa. 1990); Leckey v. Aetna Casualty & Surety Co., 590 A. 2d 1255, 1260 (Sup. Ct. of Pa. 1991).

(1987)). Fraud is simply not risk management, integral to an insurer-insured relationship, or necessarily limited to the insurance industry.[5] Compare Nader v. Allegheny Airlines Inc., 426 U.S. 290, 291 (1976) (fraud is not matter of regulation by CAB under the doctrine of primary jurisdiction); In Re Long Distance Telecommunication Litigation, 831 F.2d 627, 632, 634 (6th Cir. 1987) (RICO fraud

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[5] See also Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 505 (9th Cir.) (Employment Retirement Income Security Act not precluded by McCarran Act, cert. denied, 439 U.S. 831 (1978); Miller v. National Fidelity Life Ins. Co., 588 F.2d 185, 187 (5th Cir. 1979) (Federal Arbitration Act not precluded by McCarran Act). Compare Cochran v. Paco, 606 F.2d 460, 467 (5th Cir. 1979) (Truth in Lending Act not precluded by McCarran Act) with Lowe v. AARCO-American Ins. Co. 536 F.2d 1160, 1162 (7th Cir. 1976) (contra). See also Women in City Government, United v. City of New York, 515 F. Supp. 295, 303 (S.D. N.Y. 1981) (Civil Right Act of 1964 not precluded by McCarran Act); United States v. Meade, 179 F. Supp. 868, 874 (S.N. Ind. 1960) (criminal prosecution) (Securities Act of 1933 not precluded by McCarran Act).

is not matter of regulation for FCC under doctrine of primary jurisdiction).

Nor may a holding that RICO's civil sanctions invalidate, impair, or supersedes state law be squared with the express text of RICO or this Court's unequivocal teaching in United States v. Turkette, supra. RICO is a remedial statute that must be broadly interpreted in all its applications. Sedima, 473 U.S. at 491 n.10, 497-98. Congress specifically directed that RICO be "liberally construed to effectuate its remedial purposes." 84 Stat. 947 (1970). The directive is a "mandate." Lou v. Belzberg, 834 F.2d 730, 737 (9th Cir. 1987), (citing Sedima, 473 U.S. at 492 n.10), cert. denied, 485 U.S. 993 (1988). The McCarran Act, however, must be narrowly construed. Cochran, 606 F.2d at 467 (cases collected). As such, a broad construction of the McCarran Act and a

narrow construction of RICO, as engaged in by the Court of Appeal, are contrary to congressional intent.

While broad, RICO does not, of course, displace other bodies of law, federal or state. In fact, Congress expressly saved "provision[s] of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO. 84 Stat. 947 (1970). "Congress enacted RICO in order to supplement, not supplant the available remedies since it thought those remedies offered too little protection for the victim." Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 392 (7th Cir. 1984) (emphasis added), aff'd, 473 U.S. 606 (1985). RICO's criminal and civil sanctions and the criminal and civil sanctions of other laws, federal and states, are to exist side by side. The

existence of such cumulative remedies furthers remedial purposes. Herman & McLean v. Huddleston, 459 U.S. 375, 386 (1983). Holding that RICO's civil sanctions invalidate, impair or supersede state law is, therefore, squarely inconsistent with RICO's express text and the unequivocal teaching of this Court in Turkette, 452 U.S. at 586 n.9 (under No Supersession Clause, states free to exercise powers "to the fullest constitutional extent"). Cf. County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1305-08 (2nd Cir. 1990) (similar rejection of "public utilities exception" to RICO).

Tragically, the Court of Appeal's illiberal decision threatens to sharply curtail the efforts of victims of sophisticated patterns of mail and wire fraud in the area of insurance fraud to vindicate their rights and to contribute

the substantial benefits of private enforcement under RICO to the public interest. As such, the Court of Appeal's effort to bifurcate RICO into its criminal and civil enforcement mechanisms flies in the face of Congress' integrated design of public and private enforcement.[6] This illiberal construction of RICO could not come, too, at a more inopportune time.[7]

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[6] See Agency Holding Corp., 483 U.S. at 151 ("private attorneys general [for] a serious national problem for which public prosecutorial resources be deemed inadequate"); Shearson/American Express, Inc., 482 U.S. at 241 ("vigorous incentives for plaintiffs to pursue RICO claims"); Sedima, 473 U.S. at 493 ("private attorney provision...designed to fill prosecutive gaps").

[7] Insurance fraud is spreading throughout the nation at a frightening rate.

> Fraud and exaggerated claims are driving up the cost of workers' compensation insurance by billions of dollars a year, a variety of experts say, and have become a significant though still largely unrecognized factor in the skyrocketing cost of health care....'[W]orkers' compensation

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> is riddled with fraud'.... In more than a dozen states where employers have been hit by double-digit premium increases, officials say rising workers' compensation costs have devastated small companies and sapped the competitiveness of entire industries.

Peter Kerr, Vast Amount of Fraud Discovered in Workers' Compensation System, N.Y. Times, Dec. 29, 1991, at A1.

> Experts now estimate that fraud and abuse in the health-care field cost somewhere between $50 billion and $80 billion each year--a figure that dwarfs the estimated $5 billion lost through criminal fraud in the entire savings and loan debacle.... [A]nd the scams are growing dramatically bigger, bolder and more sophisticated.

Gordon Witkin et al., Health Care Fraud, U.S. News & World Report, Feb. 24, 1992, at 34.

> As the nation's health insurance crisis deepens, it is breeding a new problem, the growing sale of group health policies that prove worthless because of fraud or mismanagement. From 1988 to 1990, more than 400,000 people were victimized by dozens of problem insurance plans, according to the General Accounting Office, the

This Court's approach to the exercise of its Certiorari jurisdiction is well-established. The resolution of conflicts "is one of the traditional function of this Court." Charles Dowd Bos. Co. v. Courtney, 368 U.S. 502, 514 (1962). See Moskal v. United States, 111 S. Ct. 461, 464 (1990) ("to resolve a divergence of opinion among the courts of appeals.") "[I]mportant and recurring" issues ought to be settled, Glus v.

Congressional investigative agency.

Barry Meier, A Growing U. S. Affliction: Worthless Health Policies, N.Y. Times, Jan. 4, 1992, at 4. See generally, Sub comm. on Oversight and Investigation of House Comm. on Energy and Commerce, 101st Cong. 2nd Sess. at iii, Failed Promises: Insurance Company Insolvencies (Comm. Print 1990) ("parallels between the present situation in the insurance industry and the early stages of the savings and loan debacle are both obvious and deeply disturbing"); Myths at 892 n.115 (data on fraud by insurance companies, particularly with Medicare funds, reviewed); Robert Pear, Many on Medicare and are Overcharged Despite New Law, N.Y. Times, March 1, 1992.

Brooklyn Eastern District Terminal, 359 U.S. 231, 232 (1959), which affect a "considerable number of suits," Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235, 237 (1964). Under these standards, this Petition is, therefore, eminently Certiorari-worthy.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeal of California.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AMERICAN INTERNATIONAL GROUP, INC., et al.,
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

BRUTOCO ENGINEERING & CONSTRUCTION, INC.,
Real Party in Interest.

B058371
(Super. Ct. No. C755134)

Petition for Writ of Mandate. Honorable Stephen O'Neil, Judge. Writ granted.

Arter, Hadden, Lawler, Felix & Hall and William S. Davis for Petitioners.

No appearance for Respondent.

Jones, Mahoney & Brayton, Paul M. Mahoney and Richard A. Soll for Real Party in Interest.

Petitioners, American International Group, Inc. and American Home Assurance Company, are defendants in an action commenced by respondent Brutoco Engineering and Construction, Inc. ("Brutoco"). Brutoco seeks dam-

ages on a number of legal theories[1], all of which allegedly arise from certain misrepresentations made to it by petitioners with respect to a policy for workers' compensation insurance. The only claim with which we are concerned is the tenth cause of action which was brought under the Racketeer Influenced and Corrupt Organizations Act. (18 U.S.C. §§ 1961-1968 ("RICO").)

The question which we address is both novel and narrow. Petitioners ask us to issue a writ of mandate requiring the trial court to vacate an order denying their motion for a judgment on the pleadings with respect to Brutoco's RICO claim. Petitioners assert that such a cause of action is precluded by the operation of the McCarran-Ferguson Act (15 U.S.C. §§ 1011 et seq., see fn. 3, *post*) and the laws of the State of California purporting to regulate the business of insurance. We conclude that petitioners are correct and that a civil RICO cause of action can not be asserted by an insured in California against an insurer for alleged misrepresentations made in the course of the marketing, sale or performance of an insurance policy contract. We therefore grant the writ.

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[1]Brutoco's complaint, filed on March 14, 1990, asserted ten separate causes of action: (1) breach of insurance contract, (2) breach of duty of good faith and fair dealing, (3) breach of fiduciary duty, (4) bad faith breach of contract, (5) intentional misrepresentation, (6) negligent misrepresentation, (7) declaratory relief, (8) professional malpractice, (9) conspiracy and (10) RICO. The record reflects that a judgment on the pleadings has already been granted in favor of the petitioners with respect to the second, third and fourth causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a dispute between petitioners and Brutoco which stems from a written contract of insurance issued by petitioners on October 1, 1986. That contract provided for a one-year policy of workers' compensation insurance for Brutoco. Certain provisions in the policy contract related to a premium "endorsement agreement"[2] whereby petitioner agreed to refund certain premiums to Brutoco depending upon the claims history over a specific period of time.

On March 14, 1990, Brutoco filed a complaint in which it alleged that by virtue of the total premiums which it paid and its relevant claims history it was entitled to a refund of premiums in excess of $200,000. Brutoco sought, by its action, to recover this sum plus other substantial damages including interest, costs and attorney's fees. One of the theories relied upon was a federal Statutory cause of action under RICO.

To support that claim Brutoco alleged that petitioners' failure to pay the premium refund to it under the policy was coupled with a fraudulent intent never to pay a refund. Brutoco further alleged that such an intent was part of a fraudulent scheme perpetrated on Brutoco and

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[2]These provisions are described in Brutoco's complaint as an agreement whereby petitioners would, within six months after termination of the policy, make an audit of Brutoco's records in order to determine the standard premium and from that the "basic premium"; within eight months after policy termination, petitioners agreed to determine the amount of incurred losses, including an estimate of unpaid losses. From such determination of basic premium and incurred losses petitioners were required to calculate the amount of the "retrospective premium." The difference between the retrospective premium and the premiums actually paid by Brutoco were to be refunded to Brutoco.

on other insureds and that mail and wire fraud were used as instrumentalities to communicate or further false representations regarding the intent to pay premium refunds. Based on these allegations, Brutoco asserts that the misrepresentations constituted the required "predicate acts" under RICO.

On February 11, 1991, petitioners filed their answer in which they alleged, inter alia, that Brutoco could not state a cause of action under RICO, as such a claim was barred under the provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. ("McCarran-Ferguson")[3] On March 11, 1991 petitioners filed a motion for judgment on the pleadings with respect to Brutoco's RICO claim, arguing that it was preempted as a matter of law under McCarran-Ferguson.

On April 1, 1991, the trial court denied the motion after noting that sufficient facts had been alleged to assert a RICO claim against petitioners and that no published

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[3]The relevant portions of *McCarran-Ferguson* provide:

"§ 1011. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

"§ 1012.

"(a) *State Regulation.* The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) *Federal Regulation.* No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . ."

case had held that McCarran-Ferguson bars such a claim in those states which have enacted laws purporting to regulate the business of insurance.[4]

Asserting that they have no plain, speedy or adequate remedy at law, petitioners filed a timely petition for a writ of mandate with this court seeking an order directing the trial court to vacate its order of April 1, 1991 and to enter a new and different order granting petitioners' motion. On May 24, 1991, we issued an alternative writ.

ISSUE PRESENTED

The dispositive issue before us is whether, in light of California law purporting to regulate the business of insurance, the provisions of McCarran-Ferguson preclude

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[4]Petitioners sought to rely upon *Richart* v. *Metropolitan Life Ins. Co.* (1990 E.D. Pa.) No. 89-1725 (1990 Westlaw 39268), an unpublished decision of a federal district court. The trial court refused to consider this case because of its unpublished status, apparently relying upon California Rules of Court, rule 977(a). The parties engage in considerable debate as to whether this rule has any application to unpublished federal cases, as opposed to California decisions. However, we do not need to reach that issue. We are content to evaluate the relative merits of the issues presented without the assistance of this federal case.

Prior to oral argument, petitioners also provided us with two additional cases which are supportive of their position. The first is *Senich* v. *Transamerica Premier Ins. Co.* (W.D.Pa. 1990) 766 F.Supp. 339, a decision of the United States District Court for the Western District of Pennsylvania filed on September 18, 1990. The second case is from the intermediate appellate court of the State of Pennsylvania, *Leckey* v. *Aetna Casualty and Surety Co.* (Pa. Super. 1991) 590 A.2d 1255. We have reviewed these cases but have chosen not to rely upon them in our analysis and resolution of the issue presented to us. The federal and California authorities discussed below are adequate to support the conclusion which we reach.

the assertion of a RICO claim based upon an insurer's alleged misrepresentations regarding the terms of a policy of insurance and the insurer's performance thereunder.

DISCUSSION

1. Standard of Review

A motion for judgment on the pleadings serves the same basic function as a demurrer. (*April Enterprises, Inc.* v. *KTTV*(1983) 147 Cal.App.3d 805, 825.) On review, the appellate court must assume the truth of all facts properly pleaded. (*Blank* v. *Kirwin* (1985) 39 Cal.3d 311, 318; *Stockton Newspaper, Inc.* v. *Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99.)

Ordinarily, the review of the trial court's refusal to sustain a demurrer or grant a judgment on the pleadings would be on the abuse of discretion standard and would, in any event, rarely be considered in an application for extraordinary writ relief. (*Babb* v. *Superior Court* (1971) 3 Cal.3d 841, 851.) However, where the issue is tendered, as it is here, on undisputed facts[5] and is purely legal in nature, it calls for the court's independent appellate review (see, e.g., *Crocker National Bank* v. *City and County of San Francisco* (1989) 49 Cal.3d 881, 888) and where the issue raised is one of significant legal import, relief by extraordinary writ is appropriate. (*Babb* v. *Superior Court*, *supra*, 3 Cal.3d at p. 851: see also, *Omaha*

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[5]Brutoco filed no answer or demurrer to the petition (as provided in Calif. Rules of Court, rule 56(e)), but simply a set of points and authorities expressing its opposition to petitioners' request for writ relief. We therefore will deem petitioners' allegations as uncontroverted. (See *Pacific Indem. Co.* v. *Superior Court* (1966) 246 Cal.App.2d 63, 65, fn. 2.)

Indemnity Co. v. *Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) Thus, a pure legal issue of preemption is properly handled by a motion for judgment on the pleadings and its denial is properly reviewed by petition for writ of mandate. (*Commercial Life Ins. Co.* v. *Superior Court* (1988) 47 Cal.3d 473, 476.)

As the issue before us has not heretofore been addressed in California, or apparently elsewhere in the United States (except for two federal trial court decisions and one state appellate court decision, all in Pennsylvania — see fn. 4, *ante*), it was appropriate for us to take the unusual step of granting writ review of what is essentially a pre-trial pleading matter. (See *Cianci* v. *Superior Court* (1985) 40 Cal.3d 903, 908, fn. 2.) In taking this step we are not unmindful of the significant impact which the availability of a civil RICO claim would have upon California litigation between insurers and insureds given existing California decisional and statutory law.

2. Summary of Brutoco's Alleged RICO Claim

Brutoco, by its tenth cause of action, seeks to obtain the very substantial benefits of a civil RICO claim which include not only "threefold the damages" sustained, but also "the cost of the suit, including a reasonable attorney's fee." (18 U.S.C. § 1964, subd. (c).)

RICO is a federal statute which provides both civil and criminal remedies. It prohibits the employment of a pattern of racketeering activity so as to affect interstate commerce in any of the ways specified in the statute. (See generally, *Sedima, S.P.R.L.* v. *Imrex Co.* (1985) 473 U.S. 479, 484-486.) In order to state a civil cause of action under RICO, Brutoco pled that petitioners were a "racketeering enterprise" engaged in a "pattern of racketeering

activity." (18 U.S.C. §§ 1961, subd. (5), 1962.)[6] "Racketeering activity" is defined in RICO to include various criminal activities as "predicate acts," including mail and wire fraud, which are federal crimes where the mails or wire, radio or television communications are used to transmit false representations to obtain money or other property. (See 18 U.S.C. § 1961, subd. (1)(B) [defining wire and mail fraud as being one type of a "racketeering activity"]; 18 U.S.C. § 1341 [defining mail fraud and making it a federal crime]; 18 U.S.C. § 1343 [defining wire fraud and making it a federal crime].)

Brutoco further alleged that petitioners had a fraudulent intent never to pay Brutoco the premium refund in accordance with the terms of the workers' compensation policy. In support of the "predicate acts" necessary to invoke RICO civil liability, Brutoco alleged that petitioners had implemented this fraudulent intent or scheme by using the mails to deliver the workers' compensation policy to Brutoco, to accept the premium payments through the mails and by sending letters or making false statements by telephone when the policy issued that the premium refunds would be provided to Brutoco.

Brutoco argues, and the trial court concluded, that it is sufficient to allege the commission of such predicate acts in order to state a valid RICO claim; it makes no difference that the defendant is an insurance company and that the alleged misconduct took place in the context of the sale and performance of a policy of insurance. Petition-

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[6]In the complaint, Brutoco alleges petitioners are "engaged in activities which affect and constitute interstate commerce" in that they sell "insurance coverage to persons and organizations throughout the United States, including Brutoco." The required "enterprise" allegation asserts that petitioners are "an insurance company engaged in the business of selling insurance."

ers, on the other hand, contend that, by virtue of McCarran-Ferguson, special rules apply to the conduct of the "business of insurance" which effectively permits state law to preempt RICO.

3. The History and Purpose of McCarran-Ferguson

McCarran-Ferguson sets forth a policy declaration by Congress that it is in the public interest that the primary regulation of the business of insurance be in the States, not in the national government. (15 U.S.C. § 1011.) It was passed in 1945 in response to a U.S. Supreme Court decision (*United States* v. *South-Eastern Underwriters Assn.* (1944) 322 U.S. 533 [64 S.Ct. 1162, 88 L.Ed. 1440]) which held that the business of insurance was "commerce" within the meaning of the Commerce Clause and therefore the business of insurance was subject to all federal laws, including those relating to antitrust. (*Id.*, at p. 553.) This was a major change in the law. In 1869 the Supreme Court had held (*Paul* v. *Virginia* (1869) 75 U.S. (8 Wall.) 168, 183) that insurance was not "commerce" and therefore was not subject to federal Commerce Clause statutes.

The clear purpose of McCarran-Ferguson was to abrogate this change and to insure that the states would continue to enjoy broad authority in regulating the dealings between insurers and their policyholders. (*Cochran* v. *Paco, Inc.* (1979) 606 F-2d 460, 463.) As the Supreme Court itself later explained, "The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357,

361 (1869). Consequently, regulation of insurance transactions was thought to rest *exclusively* with the States. [Emphasis added.] In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. Congress reacted quickly.... The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest." 59 Stat. 33 (1945), 15 U.S.C. § 1011.... [¶] ... In context, however, it is relatively clear what problems congress was dealing with. Under the regime of *Paul* v. *Virginia, supra*, States had a free hand in *regulating the dealings between insurers and their policyholders.* Their *negotiations, and the contract which resulted*, were not considered commerce and were, therefore, *left to state regulation.* The *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the *activities of insurance Companies in dealing with their policyholders would remain subject to state regulation.*" (*SEC* v. *National Securities. Inc.* (1969) 393 U.S. 453, 458-459 [89 S.Ct. 564, 21 L.Ed.2d 668], emphasis added.)

Thus, there seems little question that Congress, by its passage of McCarran-Ferguson, returned to the states "the plenary power to regulate the business of insurance that they had enjoyed prior to the *South-Eastern Underwriters* decision. If Congress intended to invoke its Commerce Clause powers to occupy part of the field of

insurance regulation, it would expressly say so." (*Cochran* v. *Paco Inc., supra*, 606 F.2d at p. 463.)[7]

4. Analysis Necessary to Application of McCarran-Ferguson

There is a four-step analysis which must be made to determine if McCarran-Ferguson is to bar the application of a particular federal statute. (*Cochran* v. *Paco, Inc., supra*, 606 F.2d, at p. 464.) In the context of this case, such analysis requires that four questions be considered: (1) Does RICO "specifically relate to the business of insurance" within the meaning of sections 2(a) and 2(b) of McCarran-Ferguson (15 U.S.C. §§ 1012(a) and 1012(b))? If so, then the inquiry is at an end as the statute would come within the exception to McCarran-Ferguson's application; (2) Do petitioners' activities, as alleged in Brutoco's complaint, constitute the business of insurance for purposes of McCarran-Ferguson? (3) If petitioners' activities do constitute the business of insurance, then has California enacted any laws "for the purpose of regulating" such activity? (4) If so, would the

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[7]The legislative history of McCarran-Ferguson makes clear that it was Conqress' intent that any law relating to interstate commerce (and this obviously includes RICO) which did not specifically relate to insurance would be subject to the provisions of McCarran-Ferguson. As one of the authors of the legislation, Senator Ferguson, put it during Senate debate, "If there is on the books of the United States a legislative act which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected because the Congress had not . . . said that the new law specifically applied to insurance." (91 Cong.Rec. 481 (1945); *Cochran* v. *Paco, Inc., supra*, 606 F.2d at p. 463, fn. 7.)

application of RICO invalidate, impair or supersede such laws?

Because the first of these questions is answered in the negative and the remaining three in the affirmative, petitioners are entitled to judgment on Brutoco's RICO claim. We discuss each in turn.

a. RICO Does Not Specifically Relate to the "Business of Insurance"

McCarran-Ferguson, by its own terms, exempts state law from the supremacy of federal law only when the federal law does not specifically address the insurance business. (*Hanover Ins. Co.* v. *Commissioner* (lst Cir. 1979) 598 F.2d 1211, 1218, cert. denied, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979).) The issue of whether a federal law does or does not specifically address the insurance business is one that is easily resolved by examining the federal statute in question, in this case RICO. Brutoco makes no claim that RIC0 in any way specifically relates to the business of insurance. It is a general commerce clause statute which provides criminal penalties and civil remedies for defined "racketeering activities." It does not refer to the business of insurance or the insurance industry, and it is clearly not intended to have any special or specific application thereto.[8]

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[8]As we point out, at least some courts have concluded that the lack of a specific reference to insurance in a federal civil rights law will not automatically bring it within McCarran-Ferguson. (See, e.g., *Spirt* v. *Teachers Ins. & Annuity Ass'n.* (2d Cir. 1982) 691 F.2d 1054, 1063-1067, vacated on other grounds, 463 U.S. 1223, 103 S.Ct. 3566, 77 L.Ed.2d 1406, (1983), reinstated as modified on other grounds, 735 F.2d 23 (2d Cir. 1984).) However, such a result is not necessarily inconsistent with the express language of McCarran-Ferguson or its legislative history which emphasized that its provisions were in-

b. Petitioners Were Engaged in the Conduct of the Business of Insurance

The question of just what Congress meant by the phrase "business of insurance" was resolved some time ago by the Supreme Court. In a landmark decision, concluding that the term did not extend to the issuance or sale of securities of insurance companies, the court, in *SEC* v. *National Securities Inc.*, put it very succinctly. "Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC* v. *National Casualty Co.* 357 U.S. 560, 2 L.Ed.2d 1540, 78 S.Ct. 1260 (1958), and the licensing of companies and their agents, cf. *Robertson* v. *California*, 328 US 440, 90 L.Ed. 1366, 66 S.Ct. 1160, (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not 'commerce.' *The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the 'business of insurance.'* Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. *But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship,*

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tended to apply to federal statutes which related "to interstate commerce."

directly or indirectly, are laws regulating the 'business of insurance.' " (393 U.S. at pp. 459-460, emphasis added.)

Applying that standard here, we have no trouble concluding that petitioners' alleged conduct, which entirely related to the marketing, sale and performance of a policy of workers' compensation insurance, and representations made in connection therewith, were clearly within the meaning of the term "business of insurance." That such representations were allegedly false and fraudulent does not alter that conclusion. After all, when we consider this issue in the context of determining whether McCarran-Ferguson will give primacy to a state's regulatory laws we can not forget that such laws are necessarily directed at some form of possible insurance company misconduct which the regulatory statutes exist to prevent or control. If statutes intended to protect or regulate the relationship between insurer or insured are deemed to impact the business of insurance, then certainly the conduct which is alleged to have occurred here, even though wrongful and thus in need of such regulation, must necessarily satisfy the test. It is difficult to imagine conduct which could more closely fit within the concept of the "business of insurance" than the marketing, sale and performance of the policy contract.

Brutoco argues that mail fraud and wire fraud can not constitute the business of insurance. This argument is a strawman as it serves only to set up Brutoco's main thesis: that McCarran-Ferguson can not be read to preempt the mail and wire fraud statutes. That conclusion is not disputed, but it simply ignores the real issue, that is, whether petitioners' activities in the marketing, sale and performance of insurance contracts involved them in the "business of insurance." Brutoco's focus on the mail and wire fraud statutes is prompted by the allegations of its

complaint that those acts are the criminal predicates for the imposition of civil liability under its RICO claim.

Essentially, Brutoco contends that because its RICO claim includes allegations that fraudulent representations were made by use of the mails, which acts allegedly violated the federal criminal statute, a civil RICO claim which was predicated upon such acts could be pursued. Brutoco argues that since Congress did not intend by the passage of McCarran-Ferguson to restrict or limit its ability to control and punish mail and wire fraud, then state laws may not have primacy over a civil claim which rests upon the commission of those criminal acts. The emptiness of this argument is illustrated by the case cited in its support.

Brutoco relies upon the leading case of *United States* v. *Sylvanus* (7th Cir. 1951) 192 F.2d 96, where, in affirming a criminal conviction of defendants who had engaged in mail fraud in connection with the sale of accident and sickness insurance policies, the court held that McCarran-Ferguson did not preempt enforcement of the federal mail fraud statute against persons engaged in the insurance field merely because state law regulated that conduct. The court put it, "We conclude, then, it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether mails have been utilized in attempted execution of a scheme to defraud and that the District Court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment." (*Id.*, at p. 100.)

While we obviously agree with Brutoco that McCarran-Ferguson did not represent a congressional intent to

surrender control of the use of the mails to the states, we reject the conclusion which Brutoco draws from that obvious fact. *Sylvanus* related to the vindication of federal primacy in the enforcement of its criminal laws; it involved a criminal prosecution for a violation of the mail fraud statute. *Sylvanus* does not support the proposition that a civil RICO claim, which is predicated upon proof that a violation of the mail or wire fraud statutes had occurred, is beyond the reach of McCarran-Ferguson. Brutoco's action has not been brought under the mail or wire fraud statutes. It is a civil action under RICO.[9] *Sylvanus*, upon which Brutoco so heavily relies, related solely to the former and, in our view, is irrelevant to the latter.

This distinction was made clear in the case of *American Hospital & Life Ins. Co.* v. *Federal Trade Com'n.* (5th Cir. 1957) 243 F.2d 719. There, the FTC had initiated a civil enforcement proceeding against several insurers who had, in the course of marketing certain health and accident policies, allegedly engaged in false representations. The insurers were charged with distributing "in commerce" false and deceptive advertising in order to solicit purchasers for their policies. As Brutoco does here, the FTC contended that the decision in *Sylvanus* authorized it to proceed with its civil enforcement action. The Court of Appeal conceded that under *Sylvanus*, McCarran-Ferguson is no bar to a criminal prosecution. "A fraudulent scheme carried on by use of the mails would violate the mail fraud acts even though the mails never crossed a state boundary. The doctrine of the case, with the decision

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[9]As one court put it, " . . . [T]he essence of RICO . . . proscribes the furthering of the [racketeering] enterprise, *not* the predicate acts." (*United States* v. *Martino* (5th Cir. 1981) 648 F.2d 367, 381, emphasis added.)

of which we have no disagreement, is of no bearing on the problem before us here. A violation of the postal laws does not of itself confer jurisdiction on the Federal Trade Commission." (243 F.2d, at p. 724.)[10] The court concluded that *Sylvanus* did not justify the prosecution of a civil enforcement action. The fact that the insurers might be subject to criminal prosecution for violation of the mail fraud statute was not relevant; McCarran-Ferguson precluded a civil remedy under the Federal Trade Commission Act for false representations in the selling of insurance.

American Hospital's conclusion regarding *Sulvanus'* irrelevance to these facts was echoed in the sixth circuit case of *National Casualty Co.* v. *Federal Trade Com'n* (6th Cir. 1957) 245 F.2d 883, 888. The United States Supreme

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[10]As petitioners correctly argue in their brief, *Sylvanus* may also be distinguished on constitutional grounds. The criminal mail fraud statute is based on Congress' quite separate constitutional power to establish and regulate the use of the mails (a federal instrumentality and agency) whereas the McCarran-Ferguson Act was primarily intended to address Commerce Clause statutes. *Sylvanus* so reasoned on this distinction and noted that use of the mails was not a matter regulated by state law. (*Sylvanus, supra*, 192 F.2d at 100.) RICO, however, as declared by Congress in its legislative findings supporting its enactment, is a Commerce Clause statute designed to address the burden on interstate and foreign commerce of racketeering enterprise activities. (*United States* v. *Vignola* (E.D.Pa. 1979) 464 F.Supp. 1091, 1096, affd., 605 F.2d 1199 (1979); cert. den., 444 U.S. 1072 (1980).) The McCarran-Ferguson Act was manifestly intended to reach Commerce Clause statutes such as RICO and to leave regulation of insurance as "commerce" to the states. (*SEC* v. *National Securities, supra*, 393 U.S. at pp. 359-360.) That may explain the court's reference in *American Hospital* to the fact that use of the mails supports the crime of mail fraud "even though the mails never crossed a state boundary." (*American Hospital, supra*, 243 F.2d, at p. 724.)

Court granted *certiorari* in both cases and affirmed. (*Federal Trade Commission* v. *National Casualty Co.* (1958) 357 U.S. 560, 565 [78 S.Ct. 1260, 2 L.Ed.2d 1540].) We believe that conclusion is equally applicable here. *Sulvanus*' affirmance of the primacy of the federal criminal statutes prohibiting mail and wire fraud simply has nothing to do with the question of whether a *civil* RICO claim can be asserted against an insurer for alleged misrepresentations. That such misrepresentations may have been communicated to Brutoco in a manner which violated those statutes may well subject petitioners to criminal prosecution, but not to a civil RICO claim in those states which have enacted laws regulating the business of insurance.

The scope and the impact of McCarran-Ferguson's preservation of the states' right to regulate the business of insurance is illustrated by the cases which consistently have applied its principles, including the four relied upon by Brutoco. In the first of these, *Cochran* v. *Paco, Inc.*, *supra*, 606 F.2d 460, the court held that automobile insurance premium financing by an independent premium finance company did not constitute the business of insurance so as to preclude application of the disclosure requirements of the federal Truth in Lending Act. (606 F.2d, at p. 467.)[11] In language not at all helpful to Brutoco, the court said that the key factor in determining the scope of the term business of insurance "is the

[11]We note in passing, however, that not all cases have reached the same result on this issue. At least two other courts have concluded that insurance companies or insurance brokers that provide premium installment or financing arrangements are not subject to the Truth in Lending Act because of McCarran-Ferguson. (See *Lowe* v. *AARCO-American* (7th Cir. 1976) 536 F.2d 1160, 1162; *Gerlach* v. *Allstate Ins. Co.* (S.D. Fla. 1972) 338 F.Supp. 642, 649-650.)

relationship between the insurer and the insured." The court, in explaining that relationship, emphasized the language used by the Supreme Court in *SEC* v. *National Securities. Inc., supra*, 393 U.S. at p. 459, where the focus was placed on "the type of policy which could be issued, [and] its reliability, interpretation and enforcement." The court concluded that these elements of the insurer-insured relationship are simply not affected "to any significant extent by premium financing arrangements." (*Cochran* v. *Paco, Inc., supra*, 606 F.2d at p. 466.)

Similarly, *United States* v. *Meade* (S.D. Ind. 1960) 179 F.Supp. 868 provides Brutoco with little assistance. It simply holds that an insurance agency corporation (Including its promoters) which issued and sold stock was subject to criminal prosecution under the Securities Act of 1933. (179 F.Supp. at p. 874.) That the proceeds of such stock sales were invested in an insurance company which then issued health and accident policies sold by the agency corporation did not implicate McCarran-Ferguson. Such activity was not the "business of insurance"; it did not involve the insurer-insured relationship. Indeed, the defendants in this case were in no different position from that of any other investor in the stock of an insurance company. (*Id.*, at p. 876.) In any event, as *Sylvanus* made clear, McCarran-Ferguson is no bar to the general application of United States criminal jurisdiction, even to persons engaged in the business of insurance.

Next, in *Women in City Govern. United* v. *City of New York* (S.D.N.Y. 1981) 515 F.Supp. 295, the court held that the City of New York and the Governing Board of its retirement system were subject, in spite of McCarran-Ferguson, to actions under Title VII of the Civil Rights Act of 1964 ("Title VII," 42 U.S.C. § 2000e, et seq.) for gender discrimination in providing lesser pension or

group benefits to women. (515 F.Supp. at p. 306.) The court held that Congress did not intend that McCarran-Ferguson be a limitation on its power to enact civil rights legislation that might incidentally affect the business of insurance. (See fn. 8, *ante*.) As the court put it, "[McCarran-Ferguson] should not be applied indiscriminately to subsequent federal legislation, *the overriding purpose of which is not the regulation of commerce but the protection of other important federal interests*, solely because that legislation fails to specifically to state that it is applicable in circumstances where insurance interests are implicated." (*Id.*, at p. 303, emphasis added.) Brutoco argues that Congress' intent to control racketeering enterprises justifies elevation of RICO to the status of civil rights laws. We reject this as facile. Apart from the fact that RICO is clearly legislation regulating interstate commerce, that argument could as easily be applied to any legislation which Congress thought enough of to enact. Such a result would totally undermine the explicit language and stated legislative purpose of McCarran-Ferguson. While we have no quarrel with a judicial reduction of McCarran-Ferguson's potential scope based upon the paramount importance of protecting constitutional rights, we see no reason to extend that principle here as Brutoco asks us to do. Congress could easily have made RICO applicable to insurance business activities but refrained from doing so.

Finally, in *Hewlett-Packard Co.* v. *Barnes* (9th Cir. 1978) 571 F.2d 502, the court held that McCarran-Ferguson does not prevent preemption by ERISA of a state statute relating to employee health benefit plans. Not only did Congress make it unmistakably clear that ERISA was intended to preempt all state laws that directly regulated

employee benefit plans (*Id.* at p. 504),[12] but here the critical factor was not that ERISA had nothing to do with the business of insurance but rather that it did. ERISA falls within the exception contained in section 2(b) of McCarran-Ferguson (15 U.S.C. § 1012, subd. (b)), as it "specifically relates to the business of insurance." (571 F.2d at p. 505.)

c. California Has a Comprehensive Statutory Scheme Enacted for the Purpose of Regulating the Business of Insurance

California has enacted comprehensive legislation expressly designed to regulate the business of insurance. Indeed, it was initially enacted in 1959[13] in direct response to McCarran-Ferguson. That legislation[14] expressly includes as a prohibited act the very conduct which is asserted here by Brutoco as the basis for its

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[12]Also, ERISA itself provides in the "deemer clause" (29 U.S.C. § 1144 (b)(2)(B)), that employee benefit plans may not be deemed to be in the business of insurance for purposes of state law. (*Hewlett-Packard Co.* v. *Barnes, supra*, 571 F.2d at p. 505.)

[13]The Unfair Trade Practices Act was added by Statutes 1959 and provides, in its very first section:

> "The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Conqress as expressed in the Act of Congress of March 9, 1945 [McCarran-Ferguson, 15 U.S.C. §§ 1011, et seq.], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Ins. Code. § 790.)

[14]In addition, as we point out below, California has also enacted specific statutory provisions which are directly related to workers' compensation insurance, which is the type of insurance involved in this case.

RICO claim.[15] However, it does not provide for a private right of action, but rather only administrative remedies. (*Moradi-Shalal* v. *Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 304-305; *Tricor California. Inc.* v. *Superior Court* (1990) 220 Cal.App.3d 880, 882-883, 885-888.)

California has also specifically undertaken extensive legislative control and regulation of workers' compensa-

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[15]Insurance Code section 790.03 provides in relevant part:

"The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

"(a) Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his or her insurance.

"(b) Making or disseminating or causing to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever, any statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his or her insurance business, which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading."

tion insurance rates, including premium refunds and dividends. (Ins. Code, §§ 11730-11745; see also, *State Compensation Ins. Fund* v. *McConnell* (1956) 46 Cal.2d 330, 335-340.) These statutory provisions regulate such matters as the (1) classification of risks and premium rates, (2) factors which will determine or limit premium refunds, discounts or participatory dividends and (3) establishment of minimum premium rates and merit rating (i.e., "schedule" rating or "experience" rating) systems. Each of these issues are involved in Brutoco's claims and certainly are at the very heart of the "business of insurance" as that term has been repeatedly defined and applied.

We are aware that at least one federal case has concluded that a portion of California's legislative scheme (Ins. Code, § 790.03, subd. (h)) does not meet the criteria for describing a state law "which regulates insurance." (See *Roberson* v. *Equitable Life Assur. Soc. of U.S.* (C.D. Cal. 1987) 661 F.Supp. 416, 421-424.) However, in applying the relevant factors, we reach a different conclusion as to the regulatory statutes before us.

"Cases interpreting the scope of the McCarran-Ferguson Act have identified three criteria relevant to determining whether a particular practice falls within that Act's reference to the 'business of insurance': *first*, whether the practice has the effect of transferring or spreading policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. [Citations.]" (*Metropolitan Life Ins. Co.* v. *Massachusetts* (1984) 471 U.S. 724, 743; see also *Pilot Life Ins. Co.* v. *Dedeaux* (1987) 481 U.S. 41, pp. 48-49.)

Application of these criteria suggests that California's legislation satisfies at least two of them.[16] With respect to the first factor, it is certainly arguable that the regulatory provisions of the Unfair Trade Practices Act (Ins. Code, § 790, et seq.) do not limit or modify the risk assumed either by the insurer or the insured.[17] The spreading of the risk in this contest allows "the insurer to accept each risk at a slight fraction of the possible liability on it." (*Union Labor Life Ins. Co.* v. *Pireno* (1982) 458 U.S. 119, 127, fn. 7.) We do not seriously quarrel with the conclusion that the regulatory provisions of the Unfair Trade Practices Act have little impact on the spreading or transferring of policyholder risk. However, we have no doubt that California's insurance laws satisfy the remaining two factors.

The California legislation certainly affects an integral part of the policy relationship and necessarily involves not only the type of policy which could be issued but also its "reliability, interpretation and *enforcement.*" (*SEC* v. *National Securities Inc., supra*, 393 U.S. at p. 460, emphasis added.) "[W]hatever the exact scope of the statutory term ['business of insurance'], it is clear where the focus of Congress] was — it was on the relationship between the insurance company and the policyholder. *Statutes aimed at protecting or regulating this relationship, directly*

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[16]The *Roberson* court concluded that only one of the criteria (the third) was satisfied by section 790.03, subdivision (h). We particularly disagree with that court's view regarding the application of the second criterion and we reach a different conclusion.

[17]In this particular case, however, even this criterion is probably satisfied by the specific statutes enacted to control rate setting, classification of risks and premiums and methods for establishing premium refunds, discounts and participating dividends in the area of workers' compensation insurance. (Ins. Code, §§ 11730-11745.)

or indirectly, are laws regulating the 'business of insurance.'" (*Id.*, at p. 460, emphasis added.) The California statutes under review here relate directly to the control and prevention of the very deceptive acts of which Brutoco complains. Moreover, in our view, nothing could be more central to the insurer-insured relationship than regulating this sort of misconduct.

The final criterion is obviously met. The Unfair Trade Practices Act is not only directed expressly and solely to the insurance industry; it was originally enacted in 1959 for the specific purpose of regulating that industry and as a direct and acknowledged result of the passage of McCarran-Ferguson.

While it is true that, "None of these criteria is necessarily determinative in itself" (*Union Labor Life Ins.* v. *Pireno, supra,* 458 U.S. at p. 129) and "[n]o one factor is dispositive; rather each is instructive" (*United Food and Commercial Workers* v. *Pacyga* (9th Cir. 1986) 801 F.2d 1157, 1161 [holding that an Arizona law did not regulate insurance where only one of the three factors was present]), we are satisfied that the California legislation which impacts or relates to the conduct of petitioners described in Brutoco's complaint regulates the "business of insurance."

We therefore conclude that California's comprehensive legislative scheme (Ins. Code, § 790, et seq.) was intended to and does indeed regulate the "business of insurance" within the meaning of McCarran-Ferguson. We are not deterred in reaching that conclusion by the debatable proposition that the first criterion is not satis-

fied.[18] (Cf. *Lee* v. *Prudential Ins. Co. of America* (N.D. Cal. 1987) 673 F.Supp. 998, 1000-1001.)

d. To Apply RICO Here Would Invalidate, Impair and Supersede California's Comprehensive Statutory Scheme for Regulation of the Insurance Industry

Allowance of a RICO action seeking civil damages ("including treble damage" and attorneys fees) for the very conduct which California has chosen to regulate administratively would subvert and subsume the existing statutory scheme. It would permit a civil damage recovery where our Supreme Court has recently and explicitly held that none was intended. (*Moradi-Shalal* v. *Firemen's Fund Ins. Cos., supra,* 46 Cal.3d at pp. 304-305.) This would not be the first time that creative litigation efforts had been unsuccessfully expended to get around that decision. (See, e.g., *Maler* v. *Superior Court* (1990) 220 Cal.App.3d 1592, where we held that a statutory bad faith claim for damages could not be recast as unfair competition and

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[18]In *Commercial Life Ins. Co.* v. *Superior Court, supra,* 47 Cal.3d 473, 479-483, our Supreme Court discussed this issue in a different context (impact of the "saving clause" of ERISA on the question of ERISA preemption of Ins. Code, § 790.03(h)), but did not reach a conclusion. It reviewed without criticism *Roberson* v. *Equitable Life Assur. Soc. of U.S., supra,* and *Kanne* v. *Connecticut General Life Ins. Co.* (9th Cir. 1988) 859 F.2d 96, which had stated its general agreement with *Roberson.* However, both *Kanne* and *Commercial Life* reached the conclusion that ERISA would preempt section 790.03, subdivision (h), "even if it were found to be within the scope of the savings clause as a law regulating insurance. This conclusion is compelled by the Supreme Court's discussion [in *Pilot Life*] of congressional intent [in its enactment of ERISA], which the court cited as the most significant factor in its determination. [Citation.]" (*Commercial Life Ins. Co.* v. *Superior Court, supra,* 47 Cal.3d at p. 483.)

prosecuted under business and Professions Code sections 17200 et seq.)

CONCLUSION

From our examination of this record and the applicable law we conclude that (1) RICO does not "specifically relate to the business of insurance" and therefore does not come within the exception set out in McCarran-Ferguson's section 2(b) (15 U.S.C. § 1012(b)), (2) the alleged acts of petitioners took place in the context of their conduct of the business of insurance, (3) California's extensive insurance legislation was enacted to control and prevent just such activities and, indeed, was a direct and specific response to McCarran-Ferguson and (4) the application of RICO would clearly "invalidate, impair and supersede" California's statutory and decisional law regulating the business of insurance.

Therefore, California law preempts the application of RICO in this case. Brutoco's remedies for the alleged misrepresentations must be limited to those administrative proceedings authorized under the Unfair Trade Practices Act or to its remaining common law actions, including those for breach of contract and fraud. The trial court should therefore have granted petitioners' motion for judgment on the pleadings as to Brutoco's tenth cause of action.

DISPOSITION

The alternative writ is discharged. A peremptory writ shall issue directing the trial court to vacate its order denying petitioners' motion for judgment on the pleadings as to the tenth cause of action of the complaint and to enter a new and different order granting the same.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

We concur:

KLEIN, P. J.
HINZ, J.

CERTIFIED FOR PUBLICATION
NO CHANGE IN JUDGMENT

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AMERICAN INTERNATIONAL GROUP, INC., et. al.,
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

BRUTOCO ENGINEERING & CONSTRUCTION, INC.,
Real Party in Interest.

B058371
(Super. Ct. No. C755134)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR REHEARING

THE COURT:

It is ordered that the opinion filed herein on September 25, 1991, be modified as follows:

On page 6, line 11 of footnote 4 continued:, that reads "presented to us. The federal and California authorities" should be modified to read as follows:

> presented to us. On petition for rehearing, Brutoco cites additional published federal cases (*Dana Corp.* v. *Blue Cross & Blue Shield Mutual of Northern Ohio* (6th Cir. 1990) 900 F.2d 882; *Brownell* v. *State Farm Mutual Ins. Co.* (E.D. Pa. 1991) 757 F.Supp. 526)

and an unpublished decision of a federal district court in Illinois (*Washburn* v. *Brown* (N.D. Ill. 1986)). These cases are not really on point and we have rejected their application to the facts before us. The federal and California authorities.

On page 8, in lines 6 through 9, delete the words "or apparently elsewhere in the United States (except for two federal trial court decisions and one state appellate court decision, all in Pennsylvania — see fn. 4, *ante*)," so that the first full paragraph on page 8 reads:

As the issue before us has not heretofore been addressed in California, it was appropriate for us to take the unusual step of granting writ review of what is essentially a pre-trial pleading matter. (See *Cianci* v. *Superior Court* (1985) 40 Cal.3d 903, 908, fn. 2.) In taking this step we are not unmindful of the significant impact which the availability of a civil RICO claim would have upon California litigation between insurers and insureds given existing California decisional and statutory law.

Upon such modification of the opinion, the petition for rehearing is denied.

There is no change in the judgment.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 3 DATE: 10/25/91

Jones, Mahoney & Brayton
Paul M. Mahoney
150 W. 1st St., Suite 280
P.O. Box 940
Claremont, CA 91711

RE: American International Group Inc.
vs.
S.c.l.a.
Brutoco Engineering & Construction, Inc.
2 Civil B058371
Los Angeles NO. C755134

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 150 West First Street, Suite 280, Claremont California 91711.

On October 31, 1991, I served the foregoing document described as PETITION FOR REVIEW OF OPINION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, BY REAL PARTY IN INTEREST, BRUTOCO ENGINEERING & CONSTRUCTION, INC. on the parties in this action by placing true copies thereof in sealed envelopes addressed as follows:

William S. Davis, Esq.
ARTER, HADDEN, LAWLER,
FELIX & HALL
700 S. Flower St., 30th Flr
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Clerk of the Superior Court
111 North Hill Street
Los Angeles, CA 90012

Court of Appeal of the
State of California
Second Appellate District
Division Three
300 So. Spring Street
Los Angeles, CA 90013

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on October 31, 1991, at Claremont, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LUCY AGUIRRE

APPENDIX B

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

SECOND APPELLATE DISTRICT,
DIVISION THREE,

No. B058371
S023619

AMERICAN INTERNATIONAL GROUP et al.,
Petitioners

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

BRUTOCO ENGINEERING & CONSTRUCTION INC.,
Real Party In Interest

Real Party In Interest's petition for review DENIED.

LUCAS
Chief Justice